

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ALAN MANCHESTER et al.,

Plaintiff,

v.

CECO CONCRETE
CONSTRUCTION, LLC,

Defendant.

CASE NO. C13-832RAJ

ORDER

I. INTRODUCTION

This matter comes before the court on defendant Ceco Concrete Construction, LLC's motion for judgment on the pleadings (Dkt. # 41) and plaintiff Alan Manchester's third motion to amend complaint (Dkt. # 49).¹ For the reasons set forth below, each motion is granted in part and denied in part.

¹ It appears that Mr. Manchester either ignored or misunderstood this court's September 29, 2014 docket entry. That entry expressly stated that his second motion to amend was "superseded by" his third motion. Nevertheless, for the sake of efficiency, the court will consider the arguments made in Mr. Manchester's second motion (Dkt. # 43) along with his third motion to amend complaint.

II. BACKGROUND

This matter arises from a dispute regarding plaintiff's employment with defendant and subsequent discharge. In his First Amended Complaint ("FAC"), plaintiff alleged various claims against defendant, including : (1) breach of contract, (2) breach of implied duty of good faith, (3) quantum meruit, (4) unjust enrichment, (5) breach of implied employment agreement, (6) negligent misrepresentation, (7) promissory estoppel, and (8) violation of the Hawaii Revised Statutes ("HRS") § 388-10. Dkt. # 25.

On July 28, 2014, this court entered an order granting in part and denying in part defendant's motion to dismiss the FAC. Dkt. # 36. All of the aforementioned claims survived dismissal, except the negligent misrepresentation claim. The court dismissed that claim because the FAC failed to include "a single allegation that CECO was without the present intent to fulfill the promises relating to any future conduct." Dkt. # 36, p. 9. The court also declined to dismiss the contractual causes of action: breach of contract, breach of the implied duty of good faith and breach of implied employment agreement. The court found that although there was no written employment contract and no agreement for a definite term of employment, the allegations of the FAC taken together with the employment offer letter, plausibly suggested that Mr. Manchester was subject to a collective bargaining agreement ("CBA"). Dkt. # 36, pp. 3-4. The court reasoned that if Mr. Manchester were subject to a CBA, then his employment probably could not be terminated "at-will."

Plaintiff now seeks to amend his complaint to revive his cause of action for negligent misrepresentation. He also seeks to add allegations regarding his inability to "hire and fire" cement masons. It appears that plaintiff wants to add these allegations to establish that he was not a "supervisor" and, therefore, was in fact covered by the CBA.

Prior to plaintiff's filing of his motion to amend, defendant filed a motion for judgment on the pleadings, seeking judgment with respect to some or all of plaintiff's claims. Defendant makes alternative arguments regarding the impact of the CBA.

1 According to defendant: (1) if plaintiff *is* subject to the CBA, then defendant is entitled to
 2 judgment as to all causes of action because plaintiff failed to timely file a grievance and
 3 has thereby waived his claims, or (2) if plaintiff is *not* subject to the CBA, then
 4 Defendant is entitled to judgment as to his contractual claims because no written
 5 instrument exists to support such claims.

6 **III. ANALYSIS**

7 **A. Plaintiff's Motion to Amend the Complaint**

8 *(i) Legal Standard*

9
 10 Federal Rule of Civil Procedure 15(a) deals with amendments to pleadings. Once
 11 a responsive pleading has been filed, "a party may amend the party's pleading only by
 12 leave of court or by written consent of the adverse party; and leave shall be freely given
 13 when justice so requires." Fed. R. Civ. P. 15(a). "In exercising this discretion, a court
 14 must be guided by the underlying purpose of Rule 15 to facilitate decision on the merits,
 15 rather than on the pleadings or technicalities." *Roth v. Garcia Marquez*, 942 F.2d 617,
 16 628 (9th Cir. 1991); *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981). Further,
 17 the policy of favoring amendments to pleadings should be applied with 'extreme
 18 liberality. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987). That is
 19 not to say, however, that it should be given automatically. *Jackson v. Bank of Hawaii*,
 20 902 F.2d 1385, 1837 (9th Cir. 1990). Whether justice requires granting a party leave to
 21 amend is generally determined by reference to four factors: (1) undue delay; (2) bad faith;
 22 (3) futility of amendment; and (4) prejudice to the opposing party. *United States v. Pend*
 23 *Oreille Public Utility Dist. No. 1*, 926 F.2d 1502, 1511 (9th Cir. 1991).

24 *(ii) Negligent Misrepresentation*

25 The court will permit plaintiff leave to amend his negligent misrepresentation
 26 claim, but cautions plaintiff that the allegations in the proposed amended complaint are
 27 still insufficient. Plaintiff proposes to add a conclusory allegation that defendant was

1 “without the present intention to fulfill the promises relating to any future conduct toward
2 Mr. Manchester relating to his terms of employment.” Dkt. # 49, p. 2. This unadorned
3 allegation will not suffice. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009)
4 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory
5 statements, do not suffice.”). Rather, plaintiff must also include the factual allegations
6 stated in his reply brief as part of the proposed amended complaint along with any other
7 factual allegations that may be relevant. Dkt. # 55, p. 3.

8 Although defendant argues that this amendment will cause undue delay and
9 prejudice, the court disagrees and notes that this motion was brought prior to the court’s
10 deadline for amendment of pleadings. Accordingly, plaintiff’s motion to amend his
11 complaint to add a cause of action for negligent misrepresentation is GRANTED.

12 (iii) “*Supervisor*” Allegations

13 The court will not grant plaintiff’s request to change the allegations regarding his
14 ability to “hire and fire” cement masons because such an amendment would be both futile
15 and subject to judicial estoppel.

16 Under Hawaii law, “in the absence of a written employment agreement, a
17 collective bargaining agreement, or a statutorily conferred right, employment is at-will.”
18 *Shope v. Gucci Am., Inc.*, 14 P.3d 1049, 1064 (Haw. 2000). The court previously found
19 that there was no writing before the court that established a definite term of employment
20 and, therefore, Mr. Manchester’s employment was at-will. The court declined to dismiss
21 Mr. Manchester’s contractual claims, however, because it appeared that he was subject to
22 a CBA (which often prohibits at-will termination) and could base his breach of contract
23 claims on that document.

24 Now, however, Mr. Manchester has made clear that he has no intention of making
25 any such argument. *See* Dkt. # 42, p. 4 (“Plaintiff has not claimed that CECO violated
26 any of the specific provisions of the CBA”). Accordingly, amendment of the complaint
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1 to add allegations regarding the CBA would be futile. Additionally, the allegations Mr.
2 Manchester proposes to add directly conflict with allegations that he made in his original
3 complaint. The only justification he provides for this change of position is that he made
4 an “unfortunate misstatement.” Dkt. # 42, p. 6. He does not explain, however, why he
5 failed to correct this misstatement when he had the opportunity to do so in his First
6 Amended Complaint. The doctrine of judicial estoppel prohibits such flip-flopping.
7 *Hampshire v. Maine*, 532 U.S. 742, 750 (2001). Accordingly, plaintiff’s motion to add
8 allegations regarding his inability to “hire and fire” employees is DENIED.

9 **B. Defendant’s Motion for Judgment on the Pleadings**

10 (i) *Legal Standard*

11 A Rule 12(c) motion for judgment on the pleadings and a Rule 12(b)(6) motion to
12 dismiss are virtually interchangeable. In fact, the same standard applies to both. *See Hal*
13 *Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1989)
14 (stating standard for motion for judgment on the pleadings); *Balistreri v. Pacifica Police*
15 *Dept.*, 901 F.2d 696, 699 (9th Cir. 1988) (stating standard for motion to dismiss). The
16 only differences between the two motions are (1) the timing (a motion for judgment on
17 the pleadings is usually brought after an answer has been filed, whereas a motion to
18 dismiss is typically brought before an answer is filed), *see Jones v. Greninger*, 188 F.3d
19 322, 324 (5th Cir. 1999), and (2) the party bringing the motion (a motion to dismiss may
20 be brought only by the party against whom the claim for relief is made, usually the
21 defendant, whereas a motion for judgment on the pleadings may be brought by any
22 party). *See In re Villegas*, 132 B.R. 742, 744–45 (9th Cir. 1991). Because the two
23 motions are analyzed under the same standard, a court considering a motion for judgment
24 on the pleadings may give leave to amend and “may dismiss causes of action rather than
25 grant judgment.” *Moran v. Peralta Cmty College Dist.*, 825 F. Supp. 891, 893 (N.D. Cal.
26 1993). The mere fact that a motion is couched in terms of Rule 12(c) does not prevent
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1 the district court from disposing of the motion by dismissal rather than judgment. *See*
 2 *Amersbach v. City of Cleveland*, 598 F.2d 1033, 1038 (6th Cir. 1979). Therefore, the
 3 court considers defendant's motion as it would a motion to dismiss, and declines to grant
 4 judgment at this point.

5 *(ii) Dismissal as to Contractual Claims Only*

6 Defendant makes alternative arguments regarding the impact of the CBA.
 7 According to defendant: (1) if plaintiff *is* subject to the CBA, then defendant is entitled to
 8 judgment as to all causes of action because plaintiff failed to timely file a grievance, or
 9 (2) if plaintiff is *not* subject to the CBA, then Defendant is entitled to judgment as to
 10 contractual claims because no written instrument exists to support such claims.

11 Plaintiff has expressly stated that he is not alleging breach of the CBA. Thus,
 12 whether plaintiff is or is not subject to the CBA is irrelevant. Plaintiff has failed to allege
 13 any restrictions on the "at-will" employment doctrine and has failed to otherwise allege
 14 the existence of an agreement for a definite term of employment. As stated in the court's
 15 previous order, "until he retired" and "for the next several years" are not definite terms of
 16 employment. Dkt. # 36, p. 3. Accordingly, the court GRANTS defendant's motion and
 17 dismisses the causes of action for breach of contract, breach of the implied duty of good
 18 faith and breach of implied employment agreement.

19 **IV. CONCLUSION**

20 Plaintiff shall file a Second Amended Complaint that complies with this court's
 21 ruling on or before December 5, 2014.

22 Dated this 24th day of November, 2014.

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25 The Honorable Richard A. Jones
 26 United States District Judge
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